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In The

Supreme Court of the United States

October Term, 1967

No. 1213

JOHN R. SANDERS,

Petitioner,

v.

JOHN G. BONOMI,
(The Association of the Bar of the City of New York)

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF NEW YORK

The petitioner John R. Sanders prays for a writ of certiorari issue to review the Order of the Court of Appeals of the State of New York entered on October 24, 1967, in this proceeding.

OPINION BELOW

The order of the Court of Appeals, the Opinion of the Appellate Division its order and the Referee's report appears in the Appendix of this Petition.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on October 24, 1967. The time for filing this petition was extended to March 7, 1968 by order of the Honorable John Marshall Harlan on January 17, 1968. Jurisdiction in this Court is invoked under Rule 19, 1 (a).

QUESTIONS PRESENTED

1. Does a state court have the power or right to deny the right of confrontation to an accused of witnesses against him in the presentation of evidence on direct examination of the witnesses in his absence?

2. Can a state court, merely by granting the right of cross-examination at a later date, satisfy the constitutional prerequisites of due process and equal protection under law?

3. Is confrontations and cross-examination one and the same or are they separate and distinct under the rules of this court?

4. Are the guarantees of due process and the confrontation of witnesses denied:

(a) when a state court proceeds in the absence of the accused, the state court, having knowledge that the accused is under a Federal Order to appear in a Federal court and thus would be in contempt for failure to comply;

(b) in so proceeding can a State Court justify its action on the theory of an exercise of discretion;

(c) when the accused is thus so ordered by the Federal Court and cannot remain to attend the hearing in the State Court without penalty and pain of contempt proceedings in the Federal jurisdiction as well as further discipline by the respondent herein does this constitute a waiver of his rights and an abandonment of the proceedings;

(d) under the supremacy clause of the constitution should he disregard the Federal Order and submit to the lesser jurisdiction of the State Court, and does the State Court have

the power to issue such an edict;

(e) to coerce him by threat to deny him his constitutional rights and actually do so for failing to obey an illegal order which order is such because it is in contravention of a prior Federal Order with which it is inconsistent?

5. Where hearings of this nature are systematically conducted in private does this not constitute a further violation of an accused's right to a public hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C. COURT. AMEND. V. - CAPITAL CRIME; DOUBLE JEOPARDY; SELF-INCRIMINATIONS; DUE PROCESS; JUST COMPENSATION FOR PROPERTY:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property

without due process of law; nor shall private property be taken for public use, without just compensation.

AMEND. VI. - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

In all criminal proscutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMEND. XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny any person within its jurisdiction the equal protection of the laws. * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

* * *

Section 1. Due Process of Law *** nor shall any state deprive any person of life, liberty or property without due process of law; * * *

UNITED STATES CONSTITUTION, ARTICLE VI:

All debts * * * confederacy.

This Constitution and the laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made under the Authority of the United States shall be the supreme Law of the Land; * * *

STATEMENT OF THE CASE

Petitioner, John R. Sanders, at all times pertinent to this case, was an attorney-at-law, duly licensed to practice in the State of New York and elsewhere, having been admitted to the Bar on April 2, 1951 (A. 1-b).*

The questions raised herein are the result of a hearing conducted pursuant to Article 4 of the Judiciary Law, section 90, subdivision 2, etc., on charges alleging misconduct.

Preliminary hearings before a Committee on Grievances were held and completed, together with their findings, on April 16, 1964.

Respondent's petition containing the charges was verified on January 8, 1965 (A. 1-a).

The order appointing the Referee herein is dated March 18, 1965, and was sworn to April 23, 1965 (A. 1-a).

No hearing was held in June 1965, because Respondent's witnesses did not appear for employment reasons (R. 14, 15, 28), although Petitioner was ready to proceed in June 1965 (R. 11).**

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* References to the Appendix will be cited herein in a form, "A. ".

** References to the Record on Appeal will be cited herein in the form "R. ".

Prior thereto the Referee had granted Respondent two adjournments because the witnesses Underdown were ill (R. 59).

It was not until September 15, 1965 that the first hearing date in this proceedings was set (R. 1).

It is to be noted that a period of almost one and a half years elapsed from the time of the completion of the Committee's preliminary investigation to the date of the first hearing, during which time, the hearing was delayed by Respondent's three postponements or delays.

On September 15, 1965, Petitioner appeared before the Referee and requested an adjournment (R. 11-15).

Petitioner had been marked ready for trial as of September 6, 1965 (R. 13-16) a juror had been sworn on September 9, 1965, putting Petitioner actually on trial pursuant to the Code of Criminal Procedure (R. 12).

Petitioner had given Respondent at least two days notice of the engagement (R. 5, 6); and had attempted to notify the Referee at his residence beforehand and had left a message there (R. 12).

Respondent, having previously been notified, in turn notified the Referee (R. 8).

As of September 13, 1965, Respondent knew Petitioner was on trial; saw Petitioner in the Criminal Courts building; discussed the fact with him and the trial court, Mr. Justice Saypol in part 32 of the Supreme Court, New York County, but did not mention to Mr. Justice Saypol that Petitioner was due to appear before the Referee in this proceeding on September 15, 1965 (R. 6, 8-9).

Petitioner had indicated to Respondent and on September 15, 1965 he also indicated to the Referee that he was anxious to proceed (R. 10, 14) but that he did not wish to waive his rights, that bringing the witnesses back for the purpose of cross-examination would not be ample in the protection of his rights (R. 18, 19, 20, 25, 35).

When the Referee indicated that he was going to proceed in Petitioner's absence, Petitioner actually begged and begged him again not to follow his avowed course. Having no choice, Petitioner requested that he be permitted to bring the witnesses back, at his expense, in payment for an adjournment (R. 18, 19, 20, 25, 36, 41). Failing this the Referee would have proceeded forthwith.

As it turned out it was the witnesses, in effect, who obtained the adjournment for Petitioner for the Referee would not have done so and would have proceeded in the absence of Petitioner (R. 18, 19, 20, 25, 35). The witnesses were very interested in protecting Petitioner's rights, and were not concerned about

returning again (R. 29, 30, 32, 35).

The Referee contended that Petitioner should not have permitted a Supreme Court Justice of the State of New York to order him to trial in a case and should not have defied such orders for a period of nine days, that being the amount of time from the order of trial to the adjourned date at which time the hearing before the Referee was to commence, not saying, in the meantime, how Petitioner could have contravened the Order of the Supreme Court (R. 23, 24).

Moreover, Petitioner could not have reasonably objected to the trial in that it was to last for a period of but five days all of which was known to the Respondent and the Referee (R. 6).

Because of the nature of the case and in view of the many times it had been adjourned, it had been moved into a Mr. Justice Saypol's Court (Part 32) on a priority basis (R. 13, 19).

On June 9, 1966 Petitioner appeared before the Referee and requested an adjournment on the grounds that he was presently engaged on a trial in the United States District Court for the Southern District of New York and had been for a period of a month. He was due to go into cross-examination within one-half hour. He desired to remain but could not as he would be held in contempt by the District Judge. It was his impression that he had a legal excuse

for requesting an adjournment (R. 45, 46).

Petitioner stated that he wished to preserve his right to confront the witnesses, cross-examine them, make objections, etc. (R. 46). He wished to be present when these witnesses testified and he thought it was only fair that the case should be adjourned since these same witnesses were ill and had failed to appear on the previous adjourned date (R. 46).

In the meantime, while Petitioner was still engaged in the United States District Court on the same case the hearing herein was scheduled for May 4, 1966. Prior thereto Petitioner notified Respondent and the Referee, requested an adjournment, but the same was denied by the Referee.

This required Petitioner to bring on an order to show cause staying the proceeding before the Referee.

Instead of signing the order staying the proceeding, Mr. Justice Breitel of the Appellate Division of the Supreme Court held a conference in his chambers on May 3, 1966, with Respondent and Petitioner present.

Petitioner's affidavit in support of his application for a stay was before the Appellate Division and it, as well as Petitioner, among other things stated and made the following requests:

Petitioner had requested an adjournment from the Referee by telegram and that Respondent knew this. Previously, Petitioner had received but one adjournment whereas Respondent had received three and that Petitioner's request heretofore made was born of dire necessity for the reason that he was participating in an ordered trial. (A. 3g, 4g)

The Referee indicated that despite any other engagements the matter before him would proceed whether or not Petitioner was able to attend in person or be represented by counsel. (A. 7g).

Petitioner was informed by the Referee that the matter before him took precedence over all other state and federal matters and that Petitioner, on the other hand did not "accept" engagements to frustrate the state court. (A. 4g, 5g)

Respondent was informed many weeks prior to Petitioner's engagement in the United States District Court. The trial consumed in excess of nine weeks. Respondent was informed of Petitioner's present engagement at the time the application for the stay was made to the Appellate Division. (A. 4g, 5g)

That based upon the foregoing and other matters more precisely set forth in Petitioner's affidavit (A. 6g), Petitioner was powerless to act for

on April 26, 1966, the said federal case was marked ready for trial and assigned to a District Judge. Petitioner and co-counsel on the case were notified and given direct order by the United States District Court which was to be related to all other courts. (A. 6g, 7g).
The order stated that Petitioner was actually engaged on trial; that he was not to accept any other engagements; that this was a direct order of the Federal Court; that affidavits of actual engagement were to be presented to other courts and that Petitioner was to remain on call. (A. 7g)
Had Petitioner acted otherwise he would be in contempt of court and subjected to punishment by Respondent.

Petitioner requested an adjournment of the matter before the Referee until after the completion of the case on trial in the District Court. (Emphasis added). (A. 8g).

Petitioner, at the conference before Mr. Justice Breitel, estimated that the Federal case would be terminated by June 9, 1966 but asked that a later date be set to be safe, but this application was denied (R. 47). Petitioner had also requested that no date be set until after the Federal case terminated but this application was also denied (A. 8g).

The Referee was also informed that the case had continued beyond all expectations because of unforeseeable incidents and acts of God, such as the death of three relatives of a juror, two in one day; the illness of a defendant, the illness of a juror and the death of an attorney's wife (Samuel Segal, Esq.). About 10 days were lost. This necessitated a further adjournment and it was requested (R. 48, 49, 50).

Respondent was directed by Mr. Justice Brietel to (and he did) follow the case independently, going as far as discussing it with the United States Attorney for the Southern District, so that he knew the order of the United States District Court was still in force and Petitioner engaged as before when he brought his witnesses to New York from Washington, D.C. (R. 51, 58).

A letter was sent to Petitioner on May 4, 1966, without a stipulation, the latter of which was to cover what had been agreed upon in the conference before Mr. Justice Brietel. The stipulation was not included in the letter. Petitioner notified Respondent of this fact. The stipulation was not received until May 24, 1966 (R. 51, 52).

In a conversation prior to June 9, 1966, with Respondent, Petitioner stated that he had not signed the stipulation because "I do not want to hang myself", meaning that paragraph 6 of the stipulation (A. 2h) was not part of the agreement made before Mr. Justice Breitel of the Appellate Division for this paragraph required Petitioner to make any further applications for an adjournment

to the Referee and he, the Referee, had, at the commencement of the proceedings before him indicated that he would not, under any circumstances, grant an adjournment then or in the future. More than that, Petitioner meant that he could foresee by that time that the trial was going to proceed beyond the June 9th date. He did not wish to waive his rights in either circumstance (R. 52, 53).

Petitioner could not ask to be relieved in the Federal Court because he was due to proceed with cross-examination in the case momentarily (R. 45). He was ordered by the Federal Court not to be present; he had no legal excuse for failing to appear and if he had failed to appear he would have been subject to be held in contempt of that court (R. 54).

The Referee stated that Petitioner had not sent funds for transporting the witnesses from Washington. Petitioner replied that he did not wish to do a foolish thing by sending money for the transportation of the witnesses and bringing them to New York, knowing that he was still ordered on trial in the Federal Court and could not appear, for by Petitioner doing an act in furtherance of the witnesses being brought to New York City would constitute an act in furtherance of waiving his rights, (R. 56, 57).

On the other hand, Respondent transported the witnesses to New York, knowing that Petitioner was still on trial in the said Federal Court and ordered to be there and could not possibly appear (R. 51, 57, 58, 59).

The Referee said that he was going to proceed nevertheless. Thus being bludgeoned, Petitioner again requested that he be permitted to pay the expenses of bringing the witnesses back to New York for the hearing, even though the case had been adjourned twice due to their illness alone (R. 58, 59).

Petitioner reminded the Referee that he had inconvenienced the witnesses only once, if at all, for on that occasion he had given at least two days notice of his actual engagement on trial and on that occasion the witnesses were not concerned -- neither then nor at any other time did they indicate that they would be unwilling to return. Every statement in the record indicated their willingness to return (R. 59, 60, 18, 19, 20, 25, 35).

The Referee was determined to take testimony from the witnesses in the absence of Petitioner, and did, to which Petitioner objected and took an exception. He did not abandon the hearing and wished to be present but was required by order to return to Federal Court or be held in contempt (R. 60, 61, 62 to 155).

The Referee also received forty exhibits in evidence in the absence of Petitioner (R. 156, 157, 158).

Petitioner, having at all times reserved his constitutional rights on the record, as a last resort, agreed to pay the expenses of the witnesses so that he might cross-examine them (R. 245 to 249).

Again and just prior to their cross-examination, Petition, on November 3, 1966, reserved his rights of being present and confronting the witnesses and make objections on direct examination. This application was denied even though the testimony of the main witness against consumed only fifty pages. It could have been stricken from the record and taken anew. By reason of his ruling, Petitioner proceeded to cross-examine the witnesses (R. 261-266).

THE NATURE OF THE DECISION BELOW

Although the questions presented to the Appellate Division of the Supreme Court of the State of New York included both questions on the merits and the constitutional questions raised herein, only constitutional questions were raised in the Court of Appeals of the State of New York. It therefore follows that the latter Court decided the constitutional questions now raised in this Court.

REASONS FOR GRANTING THE WRIT

1. Apparently, no decision exists in the State Court which is applicable to the case at Bar. In argument before the Court of Appeals (Hon. Kenneth B. Keating) which granted Petitioner's application for a stay of the Appellate Division's order of disbarrment, Respondent was frank to admit this.

2. The Writ of Certiorari should be granted for the reason that the State Court has decided a Federal question in substance in a manner not in accord with the applicable decisions of this Court (Rule 19, 1a).

3. THE HEARING BELOW IS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION IN THAT IT CONSTITUTED A DENIAL OF THE PETITIONER'S RIGHT OF CONFRONTATION AND TO BE PRESENT DURING THE DIRECT EXAMINATION OF THE WITNESSES AGAINST HIM.

The Appellate Division and the Court of Appeals of the State of New York rendered no opinions having to do

with the right of confrontation and the right of the accused to be present when evidence was taken by the Referee in a direct examination of witnesses who appeared against the accused (A. 1c, 1b).

Essentially, the Referee's decision, confirmed by the Appellate Division and the Court of Appeals was predicated upon two themes:

a. That the Petitioner had waived his rights by agreement,

b. That his duty to appear before the Referee and the State Court was paramount to his ordered appearance in the Federal Court and that despite the orders of the Federal Court to appear, his compliance with such orders constituted an abandonment of the hearing in the State Court. Therefore, he, the Referee, ruled that in the exercise of his discretion he could rightfully deny to Petitioner the right to confront the witnesses against him on direct examination. His reasoning is that confrontation at a later date is sufficient to comply with the constitutional prerequisite of confrontation and the necessity of having the accused present during said examination (A.26a). With this we do not agree nor do the prevailing decisions of this Court.

This Court held in Willner v. Committee on Character an' Fitness, 373 U.S. 96 (1963) that:

> "the requirements of fairness are not exhausted in the taking or consideration of evidence,

but extend to the concluding parts of procedure as well to the beginning and intermediate steps. Id., at 20, 58 S.Ct. at 777. Cf. Gonzales v. United States, 348 U.S. 407, 414, 75 S. Ct. 409, 413, 99 L.Ed. 467."

In this case (Willner) the Petitioner was denied admission to the Bar without a hearing on charges filed against him. This Court held that before one could be excluded from the practice of law, due process must be afforded the accused and was careful to say, as stated above, that this includes all parts of procedure from the beginning, intermediate steps as well as the concluding parts. It ordered that all steps necessary be taken. This would, of course, include due process at the time the witnesses, as in the case at Bar, were testifying against accused on direct examination. This is taken to mean, under the facts of this case, "the beginning steps."

This Court granted certiorari in the Willner case because the issue there presented was justiciable and a controversy and the denial of Willner's rights to practice law were founded in the Fourteenth and Six Amendments.
Willner case, supra, at Page 1179-80

The ruling in the Court below is inconsistent with the ruling now discussed for the reason that it avers that the Court may grant an accused either cross-examination or confrontation but need not permit both. This is what the Court below did. It reasoned that by

permitting cross-examination as an alternative for confrontation after the direct testimony was taken of the witnesses, the constitutional guarantees were satisfied. This Court ruled otherwise when it said:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livlihood. See Greene v. McElroy, 360 U.S. 474, 492, 496-497, 79 S.Ct. 1400, 1411, 1413, 3 L.Ed. 2d 1377, and cases cited. That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. Coleman v. Watts, Fla., 81 So. 2d 650; Application of Burke, 87 Ariz. 336, 351 P. 2d 169; In re Crum 103 Or.296, 204 P. 948; Moity v. Louisiana State Bar Ass'n, 239 La. 1081, 121 So. 2d 87. Cf. Brooks v. Laws 92, U.S. App. D.C. 367, 208 F. 2d 18, 33 (concurring opinion). We think the need for cnnfrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this. Cf. Greene v. McElroy, supra; Cafeteria and Restaurant Workers Union, Local 473v. McElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L.Ed. 2d 1230."

The error of the Lower Court was in construing, if it did at all, the Willner case in the disjunctive rather than the conjunctive. That is to say, there must be extended to the accused the right of confrontation as well as cross-examination. Permitting the accused to read a transcript of testimony taken in his absence does not satisfy the minimal requirements of due process and equal protection, for it is no more than a deposition at best and when taken in his absence none can deny that the presence of the accused is lacking as well as confrontation.

In this respect, needless to say, an accused may be apprised of what had been said against him by reading a transcript of a record. In answer to this view, this Court, at Page 1181, said:

> "*** there seems no question but that Petitioner was apprised of the matters the Committee was considering.
>
> "But a 'full hearing' - a fair and open hearing - requires more than that. *** Moran v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129."

In the next paragraph the Court continued its discussion concerning the requirements in the taking or consideration of evidence, stating that it included all steps.

Two years after the Willner decision, this Court reemphasized the necessity for confrontation. The Court granted certiorari to a defendant who had been convicted in the State of Texas where a transcript of a witness's testimony given at a preliminary hearing was introduced into evidence over defendant's objection. The defendant was not represented by counsel and had no opportunity to cross-examine the witness. The Court decided, among other things, that the Sixth Amendment's guarantee, protecting an accused's right to confront a witness was supported by the Fourteennth Amendment; that the right of confrontation is implicit in the Fourteenth Amendment to grant confrontation as a matter of due process. Pointer v. State of Texas, 380, U.S. 400, 13 L ed 2d 923, 85 S Ct. 1065.

More than that, however, the Court reemphasized the conjunctive nature of confrontation and cross-examination, as is illustrated by the following quotes from the case:

> "The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right 'to be confronted withthe witnesses against him,' which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment."(at Page 401)

This Court did not conclude its reasoning on the conjunctive theory of confrontation and cross-examination but continued by saying:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. Compare Willner v. Committee on Character & Fitness, 373, U.S. 96, 103-104, 83 S. Ct. 1175, 1180-1181, 10 L. Ed. 2d 224" (at Page 406)

Continuing in the conjunctive for reemphasis, the Court states:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (at Page 405)

The Court below in failing to distinguish between the separate rights accorded an accused and its having taken a singular disjunctive approach was error.

THE DECISION OF THE COURT BELOW WAS PREDICATED UPON NOTHING MORE THAN AN AFFIDAVIT OR DEPOSITION SINCE THE DIRECT TESTIMONY WAS TAKEN IN THE ABSENCE OF THE ACCUSED AND THUS WAS VIOLATIVE OF BOTH THE COMMON LAW RIGHT OF THE ACCUSED TO BE 'PRESENT' AS WELL AS THE CONSTITUTIONAL RIGHT OF 'CONFRONTATION.'

So that justice will not be frustrated, depositions are permitted as an exception to the hearsay rule under well defined limits such as where the witness is dead, insane, too ill ever to attend or expected to attend and where the witness is kept away by the connivance of the adverse party.

Even so the adverse party is permitted all of the constitutional safeguards possible under the circumstances. The within case was not one requiring depositions because of the availability of the witnesses. What is worse, however, is that the Referee proceeded in a manner which accorded Petitioner less safeguards than would have prevailed if the evidence had been taken by deposition. At best, when reduced to it's true substance it amounted to Petitioner, in futility, attempting to cross-examine the witnesses as to their previous sworn statement or affidavit for we dare not give it the status of a true deposition.

Is this rationale correct and of substance? We think it is by analysis of another ruling of this Court and this Court so ruled in Snyder v. Massachusetts, 291 U.S. 97, 78 Law Ed. 674.

The Court held that whenever it is important that an accused be present, the Fourteenth Amendment so requires but when no purpose would be served and his presence useless or the benefit shadowy, then his presence is not required.

The Court distinguished between proceedings at the trial and motions before and after trial and appeals as examples of importance for presence and confrontation and those which were not important.

It also mentioned the distinction between the old common law right of presence and the newer constitutional right of confrontation and their application. Said the Court:

> "***Our concern is with its extension when unmodified by waiver, either actual or imputed.
>
> In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. ***
>
> The underlying principle gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after. ***
>
> Confusion of thought will result if we fail to mark the distinction

> between requirements in respect to presence that have their source in the common law, and requirements that have their source, either expressly or by implication in the Constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. ***
>
> So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair trial and a just hearing would be thwarted by his absence, and to that extent only." (291 U.S. 106, 107, 108)

There is no common law or constitutional precedent, state or federal, for the utilization of cross-examination, after there has been a denial of confrontation of the witness on the event of his giving direct evidence when the accused was not present, as and for a protective device in a fair trial (U.S.C., Amd'ts 5 and 14).

BECAUSE OF THE SUPREMACY CLAUSE OF THE CONSTITUTION, A STATE COURT MAY NOT ISSUE AN ORDER WHICH CONTRAVENES AN ORDER ISSUED BY A FEDERAL COURT AND BY IT'S ORDER INTERFERE WITH FEDERAL COURTS AND THEIR ACTIVITIES.*

On April 26, 1966, Petitioner, who represented a defendant in a federal criminal case which involved many other defendants and their attorneys, was ordered to trial by the court in the Southern District of New York (R. 45, 46). The facts of the federal order were explicit and direct and further stated that Petitioner was actually engaged on trial; that he was not to accept any other engagements; that affidavits of actual were to be presented to other courts and that Petitioner was to remain on call (A. 7g).

On April 29, 1966, the state court and Respondent were notified that Petitioner was engaged as stated above and therefore requested an adjournment. The state court (Referee) denied this request (R. 45, 58, 59, 60).

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* On this issue it is respectfully suggested that the reader peruse the entire colloquy from page 44 to 62 to reduce repetitive reading and for clarity. (See official transcript of minutes)

On May 3, 1966, Petitioner submitted the facts to the Appellate Division of the Supreme Court (Mr. Justice Breitel) for relief staying the state court from proceeding on May 4, 1966 in Petitioner's absence and for an adjournment "until after the completion of the case of United States against Leroy Davis" (R. 46, 47, 50, 51, 52, 53) (A. 8g).

Though the Appellate Division did not sign the submitted order executing the stay of the proceeding the facts therein were before the court and were argued orally in conference with the court by Petitioner and Respondent (R. 50, 51)

In lieu of this, the state court (Appellate Division) adjourned the case before the Referee until June 9, 1966. The latter date has been characterized copper-clad", the last, empowering the state court to proceed in the absence of Petitioner who appeared pro se (R. 51, 55)

On the adjourned date, June 9, 1966, because of unforeseen circumstances, the case on trial in the federal court had not terminated (R. 48, 49, 50). Notice was given to Respondent who would not agree to an adjournment unless the application was made in the state court.

The application was made in the state court before the Referee and the facts and circumstances surrounding the necessity explained to the Referee, though it was known to him (R. 48), together with a request that the proceedings not be conducted in Petitioner's

absence, all of which was denied (R. 45, 46, 47, 48, 49, 50)*

Several questions are presented on this statement of facts:

1. Does a state court have jurisdiction to issue a binding order which conflicts with a previous federal order?

2. Would such an order conflict with the supremacy clause of the Constitution?

3. May the state court nullify the rights of one in the position of Petitioner by it's issuance?

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* One of the best-known secrets in the Southern District of New York, involving both the state and federal courts, is the subdued but hostile jurisdictional battle that exudes in these courts and plagues the entire bar. The various courts have conflicting claims to jurisdiction.

Attorneys are engaged on trial by the courts on what may be best described as on a 'catch as catch can' basis or the court who can, by having the attorney physically before it, engage the attorney first. One may be certain that when a case is on the trial calendar and the court is ready to proceed to trial the attorney cannot obtain an adjournment to appear on a case for trial in futuro. This is so without regard to (footnote continued on following page)

4. Is it within the discretion of a state court to order a party to appear before it when that party is under a previous order to appear in an engagement in the federal court?

5. Is the jurisdiction of the Appellate Division of the Supreme Court of the State of New York, paramount to an actual engagement in a United States District Court?

6. Is a trial attorney, presently engaged, called upon to interrupt a trial in a United States District Court to attend a proceeding in a state court?

(Footnote continued from preceding page)

whether or not the case that will appear at a later date is superior or inferior, jurisdictionally. The attorney is merely directed to submit an affidavit to the latter court, attesting to his present engagement. This 'first come first served' theory is unquestionably recognized in all courts in this jurisdiction as the law of 'legal excuse'. Never before has it been questioned as the law, except in the case at bar.

More than likely the jurisdictional struggle and it's attendant tug-of-war-like hostility is due to the extreme calendar congestion that has afflicted

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(Footnote continued on following page)

7. Was there a waiver of Petitioner's rights in the case at bar?

8. Was there an abandonment of the proceedings in the state court when the Petitioner obeyed the federal mandate?

The one step that was taken, a conference and understanding in the Appellate Division before Mr. Justice Breitel on May 3, 1966, was an ultra vires state intrusion upon the conduct of an existent federal trial which Petitioner had been ordered to attend (R. 50, 51, 52). The state court had no authority to issue an in terrorem order

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(Footnote continued from preceding page)

the area. State courts go so far as to send clients to the federal trial courts to accost attorneys with messages concerning their failure to appear in the state court, even though the attorney had submitted an affidavit informing the court that he is actually engaged on trial in the federal court.

In candor, it must be said, the pressure generally comes from the state courts, as in the case at bar.

Federal courts are often called upon to arm attorneys either with a signed

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(Footnote continued on following page)

for Petitioner's appearance in the state court on June 9, 1966 (R. 50, 51). For at that time, the state court adjourned a hearing scheduled for the following day before the Referee, on condition that it proceed on June 9, 1966. The adjournment to that date was absolute but moreover in conflict with the preceding federal order demanding Petitioner's presence (R. 50, 51). The fact as to whether Petitioner, who was the attorney for a defendant in the trial of a multiple-defendant, multiple-count, conspiracy prosecution in the United States District Court for the Southern District of New York, United States v. Aiken, et. al., 64 CR-1111, had or had not concluded, was deemed of no consequence (R. 45, 50, 51).

(Footnote continued from preceding page)

letter or a statement on the official record, a transcript of which is given the attorneys for their protection. (See letter, Honorable Inzer B. Wyatt, U.S. D.J., dated April 22, 1966, Appendix I. For a statement on the record by the same judge to the same effect, see also official record U.S. v. L. Bailey, et. al, Southern District of New York.)

Needless to say, Petitioner who was on trial in the case received both.

Thus arrayed, the courts have invented methods of survival in the way jurisdiction is obtained over the attorney.

(Footnote continued on following page)

As was inexorably to happen, the trial in the federal court did not conclude by that date. The Petitioner was under a continuing mandate of the United States District Court, Judge John M. Cannella, presiding, to be present at each and every session of the trial, and thus could not remain before the Referee (R. 48, 49).

It is respectfully submitted that the questions put can summarily be decided by the application of the supremacy clause of the Constitution:

(Footnote continued from preceding page)

The method generally utilized by the state courts is simply by swearing one juror and nothing more. Officially, and as a matter of law, the case is declared on trial and the attorney may do nothing more until the termination of the case. He is directed to so state to all other courts by affidavit that he is actually engaged.

In the federal court, the same result is accomplished by a direct order. This is what occured in the case at bar.

Whatever relative merit exists on either side the attorney is caste upon the horns of a dilemma from which only this court can extricate him. Petitioner asks this, not for himself alone, but also for the many thousands suffering attorneys who find themselves similarly situated.

"All debts *** confederacy.

This Constitution and the laws which shall be made in Pursuance thereof and all Treaties made or which shall be made under the authority of the United States shall be the supreme Law of the Land;" *** (U.S.C., Art. 6).

Should this court sustain the thrust of the state court herein, that force would tend to regulate the federal judiciary and contribute to a breakdown in the administration of justice. A case which supports Petitioner's contention in it's statement of the law is Mayo v. United States, 319 U.S. 441, 64 S. Ct. 27, wherein it was held that the activities of the federal government, being a government of delegated powers, may not be regulated by any state, even its purpose be laudible to its people and in their interest.

The issue before the Court was raised by the act of the state of Florida in the regulation of fertilizer by label or stamp. This Court, Mr. Justice Reed, delivering the opinion of the Court, said:

" *** Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that

the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle.Article Vi. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of ompeting enactments or legal principles is possible *** (at page 445)

*** But, where, as here, the government action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." ***(at page 448). See also cases in note 5, and Kalb v. Feuerstein, 308, U.S. 343.
UNITED STATES CONSTITUTION, ARTICLE 6.

COMPLIANCE WITH THE FEDERAL MANDATE TO BE PRESENT IN THE FEDERAL COURT AND WITHIN ITS JURISDICTION DID NOT CONSTITUTE A WAIVER OF CONSTITUTIONAL RIGHTS AND AN ABANDONMENT OF THE PROCEEDINGS IN THE STATE COURT.

A defendant, after a trial had commenced, told his attorney that he did not want to go back into the courtroom. The trial judge continued the trial in the absence of the defendant without ascertaining whether or not he had waived his right to be present at the trial. It was held that the right to be present must be intelligently and competently waived. Since this was not so a new trial was ordered. Cross v. U.S., 325 F. 2d 629 (1963).

The language of the case, viewed in the light of the facts at bar, wherein the Petitioner not only preserved his rights on the record of the trial court but utilized every possible means at his disposal to prevent the trial court (Referee) from proceeding in his absence. As is well known by now, Petitioner was required to be within the jurisdiction of a federal court. By no stretch of the imagination could this be deemed a waiver or abandonment.

In discussing the subject of waiver, the Court, through Judge Wright, said:

> " *** It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' *** This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and

> competent waiver by the accused." *** This means that where the defendant is available, "the serious and weighty responsibility" of determining whether he wants to waive a constitutional right requires that hebe brought before the court, advised of that right, and then be permitted to make "an intelligent and competent waiver." This has been the uniform practice. *** (at page 631).
>
> *** "Since the right to be present at trial is "scarcely less important to the accused than the right of trial," some such procedure is certainly indicated before a trial judge can determine whether the defendant has made an intelligent and competent waiver. At least an on-the-record statement in open court by the defendant himself should be required." *** (at page 632-633).

The court below acted contrary to this procedure despite Petitioner's insistence to the contrary.

THE SECRET NATURE OF THE PROCEEDINGS FURTHER DENIED THE PETITIONER THE PROTECTION OF A PUBLIC HEARING IN CONTRAVENTION OF THE SIXTH AMENDMENT.

It may be said that systematically, attorneys within the jurisdiction of the Appellate Division of the Supreme Court of the State of New York, First Department, are not accorded a public trial.*

The place where the trial was conducted and the surroundings further degraded the nature of the said trial accounting for accumulative error. The State of New York has always declared that "the sittings within this state shall be public" with certain exceptions. (Judiciary Law, section 4 of McKinney's Consolidated Laws of New York, People

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* All of the hearings were held at the Supreme Court building in New York City but were held away from the court rooms on a floor where the judges' chambers were located. This area was not public in nature. To gain access to the room where the hearing was held, a participant was required to pass an attendant on guard and state the purpose of his visit.

There was nothing on the outside of the door to indicate that it was a courtroom of any sort and less inside the room for there was not one spare chair beyond those required for the Referee, official court reporter, one witness, Petitioner and Respondent's attorney.

v. Jelke, 1954, 308 N.Y. 56, 123 N.E. 2d 769, 48 A.L.R. 2d 1425, Civil Rights Law sec. 8. As amended L. 1923, eff. March 23, 1923. See also Morgan v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129).

The Referee, however, in a demonstrable lack of understanding of his judicial function and his responsibility and power as a judicial official took testimony of the principal complaining witnesses and admitted exhibits into evidence.

It is respectfully submitted that this was a marked abuse of discretion. Moreover, the absence of the Petitioner, meant the simultaneous absence of counsel, inasmuch as he was appearing pro se in the proceedings before the Referee (U.S.C., Amendment Fourteen).

That no court in a state would countenance such procedure in a hearing for Disorderly Conduct, an offense, apparently escaped the attention of the Referee.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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